

Reflections on the Trial Of John Peter Zenger

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There is danger in making a too-easy assumption that the "symbol" of Zenger offers present-day protection against efforts to limit press freedom, and ignoring underlying causes and 1735 opposition to the trial verdict. The author is associate professor of journalism at the University of Oregon.

PERHAPS NO EVENT IN THE HISTORY of American journalism has provided a more continuous source of reader interest than the trial of John Peter Zenger in 1735. Recognized as a journalistic landmark, since it was the first clear victory in America for a popular party in a quarrel with authority, the case in the present century has taken on all the elements of symbolism.

In our current period of controversy, with freedom of the press frequently on the defensive, the Zenger case has become a convenient anchor upon which to rely. Whenever newspapers fear that their freedom is threatened, which is often, journalists are able to recall Zenger, along with Andrew Hamilton, the lawyer who defended him. Many plaques and other kinds of memorials have been dedicated in recent years to Zenger and to his 18th century victory for the press. Some editors frequently give evidence of complacency that the case, conveniently referred to at proper ceremonies, can answer all freedom arguments that beset them.

It may be unfortunate that many journalistic writers have come to paint the colonial press picture as all white and the British Crown picture, as rep-

resented by Governor William Cosby and his henchmen, as all black. Little of the mass of present-day discussion of the Zenger case takes up the British government side of the conflict except in a decidedly negative sense, and then only with enough detail to form a groundwork for the story.

This study developed out of a desire to determine more specifically how pure the colonial cause of Zenger and his backers really was, and how disreputable that of Cosby and the King's representatives was.

The record, as obtained from a review of even a limited number of colonial sources, indicates quite clearly that the political squabble centering around Cosby ran far, far deeper than a mere newspaper row over a criminal libel issue. Zenger's libels in the *New York Weekly Journal* merely were the means of bringing the conflict into the open. When one begins to analyze the Cosby administration apart from the journalistic phase, he winds up in a maze of colonial corruption that arouses wonder. It seems amazing that the situation eventually was resolved as peacefully as it was—with Zenger's acquittal and, at the same time, with the Governor's party still in control.

For the student of journalism, the facts of the Zenger trial can be stated in a paragraph. Zenger was freed of a charge of seditiously libeling the Crown, in particular through his attacks on the corrupt Cosby administration. The trial jury was prevailed upon by the arguments of Andrew Hamilton in Zenger's defense to go beyond the strict limit of English law as it then existed. The jury took into its own hands the right to rule on the law despite Justice James Delancey's instructions to the contrary.

Having so acted, the jury decided that the truth of Zenger's accusations in his *Weekly Journal* was a sufficient defense. More than a half century later the principle that truth could be entered as a defense was embodied in American laws relating to criminal libel.

Almost all accounts of the Zenger trial, historical and journalistic, merely enlarge upon these basic findings. A long or short discussion of the popular party's quarrel with Cosby, of course, is woven into the story to round out the picture. Literary elaboration emphasizes glorious achievement and helps to symbolize the story.

There was certainly a gigantic press success involved, as witness the quotation from Gouverneur Morris, signer of the Declaration of Independence, which appears time and time again in the many patriotic accounts of the trial:¹

The trial of Zenger in 1735 was the germ of American freedom, the morning star of that liberty which subsequently revolutionized America.

¹ The author has seen this quotation many times in many accounts; in carrying out this study, specifically, it was noted in "The Legal and Journalistic Significance of the Trial of John Peter Zenger," by Ralph L. Crossman, *10 Rocky Mountain Law Review* 267, and in "The Story of a Street," by Frederick T. Hill, *Harper's*, 116:838 (May 1908).

An amazing sameness runs through all the reports of the trial. The case led the way toward the First Amendment in 1791. Therefore, it is easy and perhaps justifiable in writing about it to attribute to it something in the nature of the First Amendment. We find it easy to forget that the immediate impact of the Zenger victory was political and not legal. Because a legal result did follow, it is easy to suggest the substantive result that Zenger's battle did not achieve in his own time.

The above comments are made merely to emphasize this tendency toward idealization, to claim too much for Zenger at that moment (1735), and to assume that everyone in New York approved the jury's verdict. In more extreme portrayals of the case, it would appear that the only persons who opposed Zenger's acquittal were Cosby, Justice James Delancey and Justice Frederick Philipse, who heard the case; and Richard Bradley, the Crown prosecutor.

Yet, in high legal councils and in government circles the Zenger decision was decidedly unpopular. One can infer this directly from the fact that the only complete report of the trial seems to be that which Zenger himself published in the *Weekly Journal*. Crown authorities simply would not put out an official account of their own defeat.²

However, there are extant at least two discussions highly critical of the verdict, and of Andrew Hamilton in particular. They appear in Howell's *State Trials*, published in 1783. It seems surprising that these derogatory

² Livingston Rutherford, *John Peter Zenger, His Press, His Trial and a Bibliography of Zenger Imprints* (New York: Dodd, Mead and Company, 1904). Rutherford's book still remains the most complete on the case and it is cited extensively in almost all discussions about Zenger. In many instances it is the only source cited. Rutherford appended a splendid listing of all known reports of the Zenger case, dating from 1736 to 1841.

comments should have so long gone unnoticed, unless we are to accept complete historical dismissal of a point of view that did happen to be set aside legally in England and America. But these anti-Zenger opinions do show that the decision was a hard blow to others than those within the immediate New York circle of royal functionaries. Hamilton's victory was not received willingly everywhere and Hamilton was not the hero that he has since been proclaimed.

The Zenger trial report which is carried in Howell is the same as that published by the *Weekly Journal's* editor, a fact that would bear out the conclusion that Zenger's own account must be the only one ever reported. From a purely critical point of view, therefore, the whole coverage of the case must be pro-Zenger by nature of a common source. Taking note of this, Howell qualified his insertion of the case in the *State Trials* with this statement:³

This Trial (or rather part of a trial) published by Mr. Zenger himself, having made a great noise in the world, is here inserted; though the doctrines advanced by Mr. Hamilton in his speeches are not allowed in the courts here to be law.

The statement is clearly uncomplimentary to the findings of the case, despite the fact that by the time Howell's *State Trials* were compiled the freedom-of-the-press cause had made decided headway.

AT THE CLOSE OF THE BODY OF HIS trial report, Howell appended two long letters headed "Remarks on the Trial." The compiler's introduction to these re-

marks is sufficiently significant to be quoted at some length:⁴

These remarks were written by two eminent lawyers in one of our colonies in America, immediately after the publication of the Trial of Mr. Zenger, which it seems had been industriously spread over that part of the world, before it reached England.

As the doctrines contained in that trial, or rather in the speech of Mr. Hamilton, are . . . so absolutely contradictory to all the resolutions and judgments that have been settled and established for so many ages, . . . it could not be imagined so wild and idle a harangue could have had any weight, or have met with any reception here [England] where the laws relating to libels have been so often canvassed. . . .

But seeing . . . that this extraordinary declamation has been mentioned with an air of applause and triumph in several news-papers, as striking out some new lights with regard to the doctrine of libels; and, upon the credit of that recommendation, the whole Trial not only twice printed here, but retailed out in scraps in the public news-papers, whereby many well meaning people may be deceived, and led into wrong notions concerning the laws of their country in this point: He has thought fit to communicate these Remarks to the public, in order to remove any mistakes or errors that persons may fall into for want of an adequate judgment in these matters; and the rather, because if such false opinions should happen to influence the conduct or practice of any, the consequences may be very dangerous.

The letters were signed ANGLO-AMERICANUS and INDUS BRITANNICUS. By their anonymity, in the light of present day emphasis on sources of communications, they seem to lose some of their force—and perhaps authority. However, in a century of strict libel accountability the use of pseudonyms was common. The Junius Letters later in the same century were not

³ Thomas B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors From the Earliest Period to 1783* (London: T. C. Hansard, 1783), 21 volumes.

⁴ Howell, *State Trials*, 17:675.

signed and yet were so powerful in their influence that historians have sought for years to run down their authorship. So it appears reasonable to consider these anti-Zenger-verdict communications authentic and responsible enough. The real point here is to note that they staunchly defended the *status quo*, which happened to be the unpopular side in the quarrel with government.

"Anglo-Americanus" gave assurance that he would not have written his criticism of the verdict "if Zenger's trial had been printed by order of the Court that tried him, or from a copy taken by a private hand at the trial, or by any other means that excluded Mr. Hamilton's approbation or privy."⁵ The writer then attacked Hamilton as a "volunteer for error."

This likely is one of the very few references ever made attacking the manner in which the report of the trial reached the public.

Continuing, "Anglo-Americanus" said he wished to "undeceive such of my fellow subjects in the plantations as may, from the late uncommon successes of the doctrines, mistake the liberty of the press for a license to write and publish infamous things about their superiors." ("Anglo-Americanus" here was referring to the question of the right of juries to decide on the law and on the right of truth to be entered as evidence.)

The writer made particular point of what he called the "quackery of the profession in general . . . as it has been practiced with vast success in some of our colonies," namely, whereby "an enterprising lawyer, compounded of something between a politician and a broker" is able to convince a jury to set Zenger free. "Anglo-Americanus"

frankly and flatly doubted Andrew Hamilton's learning and integrity.

On the whole, however, this piece by Hamilton's legal critic was not a tirade. "Anglo-Americanus'" criticism was basically moderate in tone. The letter-writer definitely declared that Governor Cosby was something less than a great figure, as any study will show that goes into some of the factors of Cosby's regime extending beyond the Zenger quarrel. Denying that he had turned "advocate for lawless power in governors," "Anglo-Americanus" wrote:⁶

God forbid that I should be guilty of such a prostitution, who know by experience of what stuff they are commonly made, the wrong impressions they are apt to receive of themselves and others.

This critic then detailed his attacks on some of the specific pro-Zenger arguments against Cosby's administration, particularly with reference to the governor's arbitrary removal of judges. Hamilton's opponent noted that he was informed that there never was a pretense or surmise of more than one judge being displaced by the governor, or of more than one new court being erected under Cosby. "Anglo-Americanus" did not think one case "captious," as the Zenger defense had argued. As a critic, he was referring here to the removal of the chief justice of the colony, Lewis Morris, after Morris had refused to support Cosby in the governor's claims for financial emolument upon his arrival as governor. "Anglo-Americanus" was referring also to other Cosby maneuvers to control the New York court system.⁷

This point of the letter-writer may have some historical justification. At

⁵ *Ibid.*, p. 729.

⁶ *Ibid.*, p. 730.

least one highly reputable general historical source bears out the point that Cosby, patently grasping enough, as his quarrel with Justice Morris showed, was not completely at odds with everyone in New York. Although he had his troubles with the New York courts, the governor had continued the colonial Assembly, but not without trying to manipulate elections to it. And the Assembly "proved to be not seriously out of harmony with the governor throughout his administration."⁸

The bulk of "Anglo-Americanus'" letter, which fills 20-odd columns in Howell, is devoted to support of the basic governmental doctrines relating to seditious libel. The writer continually went back to the one big issue on which he differed with Hamilton: "That the several matters charged in the information [against Zenger] are not, and cannot be libellous, because they are true in fact." His main criticism was: "Can a thing be lawful just because it is true?" This question opened to "Anglo-Americanus" a door "for exposing at mercy the frailties, vices, defects, and misfortunes of every person, high and low, which must inevitably destroy the peace of families, and beget ill blood and disorders."⁹

This last point is supported even today in many jurisdictions against the acceptance of truth as a complete defense in criminal libel cases, the eventual legalization of the Hamilton-Zenger doctrine notwithstanding.¹⁰ "Anglo-

Americanus," however, did not recognize in his conservative defense of the *status quo* in 1735 the possibilities of relative degrees of truth. Justification of it today usually requires also good motives and justifiable ends. These are fine points that, had they existed at the time, would have made Zenger's attacks on Cosby completely supportable; but the minds of conservative 18th century lawyers did not recognize these possibilities.

THE LETTER BY "INDUS-BRITANNICUS" is less reasonable. The second writer gave as long an argument, with perhaps as many citations along the governmental line as "Anglo-Americanus," but he was far more ready to attribute motive. He called Hamilton a "pernicious creature" with "little knowledge and no morals; a character not unheard of in more than one of His Majesty's plantations."¹¹

"Indus-Britannicus" called Hamilton's speech the "most indecent behaviour at least, if it may not be called the boldest outrage, that ever was exhibited from the bar, without suitable chastisement."¹² This writer wondered whether, by defending Zenger, Hamilton did not involve himself in his client's crime and partake of his [Zenger's] guilt.¹³

One of "Indus-Britannicus'" major complaints against Hamilton's arguments rests in Hamilton's attacks on some old decisions in the British Court of Star Chamber, which had been abolished in the 17th century. Richard Bradley, the Crown prosecutor of Zenger, had cited some of these Star Chamber cases, and Hamilton had parried Bradley successfully in the Zenger trial.

⁸ Herbert L. Osgood, *The American Colonies in the Eighteenth Century* (New York: Columbia University Press, 1924). See vol. 2, p. 445; this volume, pp. 443-82, gives a detailed account of the whole political problem involving the Cosby administration, into which the Zenger case falls as one of many disturbances.

⁹ Howell, *op. cit.*, p. 731.

¹⁰ The statutes of the various states with reference to libel—and in some cases the constitutions—usually qualify the extent to which the defense is admissible. Books on journalistic law frequently tabulate these specific differences.

¹¹ Howell, *op. cit.*, p. 749.

¹² *Ibid.*, p. 749.

¹³ *Ibid.*, p. 751.

⁵ *Ibid.*, p. 727.

What irritated "Indus-Britannicus" "amidst a heap of jargon and absurdities . . . which run[s] through Mr. Hamilton's ostentatious harangue," was that Hamilton "would suggest, that because the Court [of Star Chamber] was abolished by act of parliament, on account of some insufferable abuses that crept into it, all the cases that had been adjudged, in information for libels, were consequently of no authority."¹⁴

It is difficult, more than 200 years later on the basis of 20th century freedom-of-the-press doctrine, to understand clearly all the implications behind the anti-Hamilton argument. This is so even when one today tries objectively to analyze the Tory side. But the quotations from these anonymous letters do make quite evident the fact that conservative opinion in the 1730s leaned heavily on processes outmoded even then for nearly a century. If anything, this quotation from "Indus-Britannicus" seems to make Hamilton's achievement even more remarkable.

Throughout the letter of this second critic runs a literary license that, however reactionary the legal argument, is fascinating to read. Here is a single gem, near the close of the piece, that has poetic elements:¹⁵

Mr. Hamilton seems to be rather possessed with a fit of knight errantry, and to have sallied out from Philadelphia to the other province, with a full resolution to encounter everything that was law, and to level all to the ground that stood in his way.

In view of the legal developments in the succeeding century as they related to the press, Hamilton's critic seems today to have been quite prophetic.

Livingston Rutherford's bibliography in his life of John Peter Zenger makes

only one reference to these letters. One of the publications that Rutherford cited as carrying material on the Zenger trial was issued in 1741 in the West Indies. It comprised a two-volume work on English "trade, government, and laws in general." The books were written by "several hands in the West Indies." Of Volume 2 of this collection, Rutherford noted:¹⁶

Vol. II contains "Remarks on Zenger's Trial," signed "Anglo-Americanus," in five letters; . . . also, "Remarks on Zenger's Trial by another Hand," signed "Indus-Britannicus"; . . . with an article from the *Pennsylvania Gazette* of Dec. 8, 1737; . . . and "Letter to Anglo-Americanus and Indus-Britannicus," signed, "P. C."

In his bibliographical reference to Howell's *State Trials*, Rutherford did not indicate that these critical letters were included by Howell.¹⁷

One other source at least comments on the letters. Peleg W. Chandler, member of the American Antiquarian Society and the Massachusetts Historical Society, who compiled two volumes of *American Trials* in 1841, referred to Howell's inclusion of the "Remarks on Zenger's Trial." Chandler appeared to approve of "Anglo-Americanus" and "Indus-Britannicus," since he called the

¹⁶ Rutherford, *op. cit.*, p. 254.

Frank L. Mott of the University of Missouri, in his excellent literal reprint of the *Case and Tryal of John Peter Zenger*, published as *Zenger's Own Story*, gives additional information on the conservative lawyers' disapproval of Hamilton's conduct. In an introduction and in a note on the final page of the reprint, Professor Mott refers to the newspaper controversy that followed the trial. The lawyers first inserted their letters in the *Barbados Gazette*. Thereafter, James Alexander replied in four numbers of Benjamin Franklin's *Pennsylvania Gazette*, November 17 and 20, and December 1 and 8, 1737. Thus, the defense of Hamilton's argument and answer to the lawyers were going on long after the famous trial. Reference to Howell's *State Trials* will yield nothing on the positive side of the argument. See *Oldtime Comments on Journalism*, vol. II, edited by Frank L. Mott (Columbia, Mo., 1954), pp. iii and 41.

¹⁷ Rutherford, *op. cit.*, p. 255.

remarks of a "Tory lawyer" in defense of the Star Chamber an "able criticism" of Hamilton's speech.¹⁸ Whether "Indus-Britannicus'" remarks were able or outworn, as of the middle of the 18th, 19th or 20th century, would be wholly matters of opinion. There actually are today defenders of governmental authority who would welcome a return to the pre-Andrew Hamilton period. The press may be on safer ground today if it would guard carefully against the kind of arguments voiced in these letters than it may be by assuming too readily that Andrew Hamilton and later advocates of freedom won the battle permanently.

TO GO BEYOND THE LEGAL ASPECTS of the Zenger case it becomes necessary to study detailed works on colonial history and, for any depth, to read extensively in original sources. There is hardly a work referring to the colonial period that does not make some reference to the case, but few historians give sufficient space to it to get far beneath the surface. One of the best discussions—more detailed in fact and better documented than some of the Zenger studies in journalistic works—is that of Herbert L. Osgood.¹⁹

Particularly fascinating in Osgood's account is his analysis of Governor Cosby. Whereas many writers have devoted most of their attention to Zenger and Andrew Hamilton, Osgood dissected Cosby a bit and gave him his part of the story. Osgood took the view that Cosby was perhaps no worse than any other "greedy proconsul" of the 18th century; but that it was his misfortune "to live when the newspaper

press was beginning to assert its power, and hostile public sentiment found expression concerning him which twenty or thirty years earlier it would have been impossible to embody in permanent form."²⁰

This comment in Osgood's work led the writer to look into a number of the documents of the period, and the record there bears out the historian's view. For example, Cosby was engaged, like most earlier governors, in the raping of the public domain through the setting aside of huge grants for himself. This sort of thievery conceivably could have affected more persons in the colony and led to greater animosities against the governor than his quarrel over stipends with Acting Governor Rip Van Dam, or over court jurisdiction with Judge Morris.

While the second series of situations were more directly involved in the forming of Zenger's opposition *Weekly Journal*, they still were quite removed from the public at large. Why then should public opinion be so strongly for the Zenger-Morris popular cause? At least a plausible inference seems to be that Cosby had antagonized large groups of average people on other fronts, of which land grabbing might have been the most important. Although most accounts of Cosby's machinations stress his quarrel with the press, this development seems to have been an effect rather than a cause of his troubles.

Osgood's chapter on Cosby and Zenger, therefore, leads one to become as much interested in the self-willed governor as in the popular figures in the row. For instance, one finds that Cosby was demanding a third interest in every land patent granted in New York at the

¹⁸ Peleg W. Chandler, *American Criminal Trials* (Boston: Timothy H. Clark and Company, 1841 and 1844). The comment cited is in a preface in italic note to the Zenger trial, carried in Chandler's Vol. I.

¹⁹ Osgood, *op. cit.*, vol. 2, p. 445.

²⁰ *Ibid.*, p. 445.

¹⁴ *Ibid.*, p. 752.

¹⁵ *Ibid.*, p. 763.

time, and that *Cosby Manor* was a huge tract more than 20 miles by 10 mile in extent encompassing the whole of the present area of the city of Utica.²¹ *Cosby's* name appears on at least four major patents in the Mohawk Valley, grants sufficiently large so that they will show up clearly on a book-sized map no larger than 6x9 inches. Those grants extended from a point a few miles west of Schenectady out to *Cosby Manor*. The Manor, although never

settled in the governor's lifetime nor during the lifetime of his heirs, led eventually to considerable hardship for scores of people. Among those who later became heavily involved was the famous Sir William Johnson.

It was a great deal more, then, than the governor's fight with other political leaders that caused the populace to revolt between 1733 and 1735 and to pave the way for Zenger and Hamilton. This gets us far afield from journalistic history; but it may be that the story as usually told has been made far too narrow.

²¹ Ruth Higgins, *Expansion in New York, With Special Reference to the Eighteenth Century* (Columbus: Ohio State University, 1931), p. 31.

"In what room and under which faculty member is Eric Allen Hall going to teach elemental fairness so steadfastly that it will become an inseparable part of every student who comes here?"

"Where and how is each student going to learn that the reporter and editorial writer owe far more to the reader than to any editor or publisher, who after all merely relays the newspaper man's salary from the reader without whose patronage and support there would be no newspaper? . . .

"Where and how is each student going to learn that as a newspaper man or a radio commentator or a teacher of journalism he must never be afraid to express the contrary view if he believes prevailing opinion is in error?"

"Where and how is he going to have impressed on him imperishably that Washington and Tom Paine, that Jefferson and Lincoln and Theodore Roosevelt all were dissenters who were denounced in their own day and would be dismissed as radicals by many today? . . .

"Where and how is the student going to learn that on the editorial page he must not compromise with dishonesty; that he must not turn his eyes away from unpleasant subjects and odious people when they need exposure; that he must not delay and temporize when the times cry out for him to be swift and sure?"

"Above all else, where and how is the student going to learn to care, to care what happens to his newspaper, to his profession, to his community, to his state and his nation, to care so intensely that caring becomes the mainspring of his life as a newspaper man?"

"These are not idle questions I assure you. They are not bits of rhetoric. And I suspect as well as hope that Dean Sabine and his faculty have some partial answers at least. But these questions are the very heart of our common problem."—IRVING DILLIARD, St. Louis Post-Dispatch, in the ninth Allen Memorial Lecture, one of a series of talks dedicating Eric W. Allen Hall, University of Oregon.